

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

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ALL Districts

The Texas Transportation Commission (commission) finds it necessary to propose amendments to §§9.130 and 9.131, the repeal of §§9.132 – 9.139, and new §§9.132 – 9.135 relating to Grant Sanctions to be codified under Title 43, Texas Administrative Code, Part 1.

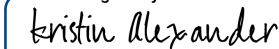
The preamble and the proposed amendments, attached to this minute order as Exhibits A, B, and C, are incorporated by reference as though set forth verbatim in this minute order, except that they are subject to technical corrections and revisions, approved by the general counsel, necessary for compliance with state or federal law or for acceptance by the Secretary of State for filing and publication in the *Texas Register*.

IT IS THEREFORE ORDERED by the commission that the amendments to §§9.130 and 9.131, the repeal of §§9.132 – 9.139, and new §§9.132 – 9.135 are proposed for adoption and are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

The executive director is directed to take the necessary steps to implement the actions as ordered in this minute order, pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Submitted and reviewed by:

DocuSigned by:



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Director, Compliance Division

Recommended by:

DocuSigned by:



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Executive Director

115905 Dec. 10, 2020

Minute
Number

Date
Passed

Proposed Preamble

The Texas Department of Transportation (department) proposes amendments to §9.130, Purpose, and §9.131, Definitions, the repeal of §§9.132 - 9.139, and new §§9.132 - 9.135, all concerning the remedies for failure to comply with applicable federal or state law, conditions, or contractual agreements related to grants.

EXPLANATION OF PROPOSED AMENDMENTS, REPEAL, AND NEW SECTIONS

The department is required by federal and state law to monitor grantee compliance. For example, Title 2, Code of Federal Regulations, Part 200 states that non-federal entities that provide grants to carry out part of a federal program must monitor the activities of the grantee to ensure the grant is used for authorized purposes, in compliance with federal statutes and regulations and the terms and conditions grant. The non-federal entity must also consider taking enforcement action against noncompliant grantees as described in Title 2, Code of Federal Regulations, §200.339, Remedies for noncompliance.

Amendments to §9.130, Purpose, and §9.131, Definitions, replace language regarding grant sanctions with remedies for noncompliance to align with federal regulations and other department rules. Proposed rules repeal current §§9.132 - 9.139 regarding grant sanctions and replace them with new §§9.132 - 9.135 regarding department remedies for grantee noncompliance. The new proposed sections align with updated federal regulations

on additional award conditions and remedies that may be imposed for noncompliance with grant requirements. The proposed rules apply to all grants issued by the department and are needed to ensure accountability for the expenditure of public funds.

New §9.132, Additional Award Conditions, outlines additional award conditions the department may impose to ensure compliance with applicable laws and standard grant conditions and requirements. Under §9.132, if the department imposes one or more additional award conditions, the department will provide the grantee notice of the condition, the reason for the additional condition, time allowed for completing the additional condition, if applicable, and the action, if any, the grantee may take to end the application of the additional condition.

New §9.133, Remedies for Noncompliance, lists the remedies for noncompliance the department may impose if the department determines the grantee failed to comply with federal or state law, a grant condition, or the grant agreement. The list of remedies for noncompliance align with the remedies available to the department under federal grant regulations.

New §9.134, Notice of Remedies, states that if the department takes an action under §9.133, the department will notify the grantee in writing of the action being taken, a summary of the facts and circumstances underlying the action being taken, and an explanation of how the action was selected.

1
2 New §9.135, Appeal of Decision on Remedies, outlines the process
3 by which a grantee may appeal a determination under §9.133 to
4 the executive director of the department. The executive director
5 may delegate the powers and duties assigned under §9.135. A
6 decision on the appeal is final.

7
8 The title of Subchapter H is changed to Remedies for
9 Noncompliance to reflect the content of the subchapter, as
10 changed by this rulemaking.

11
12 FISCAL NOTE
13 Brian Ragland, Chief Financial Officer, has determined, in
14 accordance with Government Code, §2001.024(a)(4), that as a
15 result of enforcing or administering the rules for each of the
16 first five years in which the proposed rules are in effect,
17 there will be no fiscal implications for state or local
18 governments as a result of enforcing or administering the rules.

19
20 LOCAL EMPLOYMENT IMPACT STATEMENT
21 Kristin Alexander, Compliance Division Director, has determined
22 that there will be no significant impact on local economies or
23 overall employment as a result of enforcing or administering the
24 proposed rules and therefore, a local employment impact
25 statement is not required under Government Code, §2001.022.

26
27 PUBLIC BENEFIT

1 Kristin Alexander, Compliance Division Director, has determined,
2 as required by Government Code, §2001.024(a)(5), that for each
3 year of the first five years in which the proposed rules are in
4 effect, the public benefit anticipated as a result of enforcing
5 or administering the rules will be improved integrity in the
6 department's grant management processes and department remedies
7 for grantee's noncompliance with state and federal requirements.
8

9 COSTS ON REGULATED PERSONS

10 Kristin Alexander has also determined, as required by Government
11 Code, §2001.024(a)(5), that for each year of that period there are
12 no anticipated economic costs for persons, including a state
13 agency, special district, or local government, required to comply
14 with the proposed rules and therefore, Government Code,
15 §2001.0045, does not apply to this rulemaking.
16

17 ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

18 There will be no adverse economic effect on small businesses,
19 micro-businesses, or rural communities, as defined by Government
20 Code, §2006.001, and therefore, an economic impact statement and
21 regulatory flexibility analysis are not required under
22 Government Code, §2006.002.
23

24 GOVERNMENT GROWTH IMPACT STATEMENT

Kristin Alexander has considered the requirements of Government Code, §2001.0221 and anticipates that the proposed rules will have no effect on government growth. She expects that during the first five years that the rule would be in effect:

(1) it would not create or eliminate a government program;

(2) its implementation would not require the creation of new employee positions or the elimination of existing employee positions;

(3) its implementation would not require an increase or decrease in future legislative appropriations to the agency;

(4) it would not require an increase or decrease in fees paid to the agency;

(5) it would not create a new regulation;

(6) it would not expand, limit, or repeal an existing regulation;

(7) it would increase the number of individuals subject to its applicability as the proposed rules would apply to all grants while the current rules apply to certain grant programs; and

(8) it would not positively or adversely affect this state's economy.

TAKINGS IMPACT ASSESSMENT

Kristin Alexander has determined that a written takings impact assessment is not required under Government Code, §2007.043.

SUBMITTAL OF COMMENTS

1 Written comments on the proposed amendments to §§9.130 and
2 9.131, the repeal of §§9.132 - 9.139, and new §§9.132 - 9.135
3 may be submitted to Rule Comments, General Counsel Division,
4 Texas Department of Transportation, 125 East 11th Street,
5 Austin, Texas 78701-2483 or to RuleComments@txdot.gov with the
6 subject line "Remedies for noncompliance." The deadline for
7 receipt of comments is 5:00 p.m. on January 25, 2021. In
8 accordance with Transportation Code, §201.811(a)(5), a person
9 who submits comments must disclose, in writing with the
10 comments, whether the person does business with the department,
11 may benefit monetarily from the proposed amendments, or is an
12 employee of the department.

13
14 STATUTORY AUTHORITY

15 The amendments, repeal, and new sections are proposed under
16 Transportation Code, §201.101, which provides the Texas
17 Transportation Commission (commission) with the authority to
18 establish rules for the conduct of the work of the department.

19
20 CROSS REFERENCE TO STATUTE

21 None.

SUBCHAPTER H. REMEDIES FOR NONCOMPLIANCE [~~GRANT SANCTIONS~~]

§9.130. Purpose. The department is required by law to monitor
grantee [~~subgrantee~~] compliance with federal and state laws.

The department may impose remedies [~~sanctions~~] on a grantee
[~~subgrantee~~] if the department determines that the grantee
[~~subgrantee~~] has failed to comply with federal or state law,
standard or special grant [~~or subgrant~~] conditions, or
contractual agreements on which the grant [~~or subgrant~~] award is
predicated. The remedies [~~sanctions~~] provided under this
subchapter are in addition to any enforcement provisions of an
award document, description of a specific grant [~~or subgrant~~],
or rules governing a specific grant program or any other remedy
legally available. [~~The proposed sections will only apply to~~
~~agreements signed or extended on or after the effective date of~~
~~the rules.~~]

§9.131. Definitions. The following words and terms, when used
in this subchapter, shall have the following meanings, unless
the context clearly indicates otherwise.

[~~(1) Assistant executive director--The assistant~~
~~executive director of the Texas Department of Transportation or~~
~~the assistant executive director's designee not below the level~~
~~of district engineer, division director, or office director.~~]

(1) [~~(2)~~] Executive director--The executive director
of the Texas Department of Transportation.

1 ~~[(3) Sanction--A penalty imposed under this~~
2 ~~subchapter. The term includes the withholding of funds or~~
3 ~~disallowance of costs under a grant [or subgrant], the~~
4 ~~suspension or termination of all or part of a subgrant or~~
5 ~~projects under a subgrant, and being determined temporarily or~~
6 ~~permanently ineligible for a subgrant award.]~~

7 (2) Grant ~~[(4) Subgrant]~~--An award of funds or
8 property in lieu of funds made by the department to a grantee
9 ~~[an eligible subgrantee]~~ or by the grantee ~~[eligible subgrantee]~~
10 to another individual or entity. The term does not include:

11 (A) procurement purchases;
12 (B) technical assistance;
13 (C) assistance in the form of revenue sharing,
14 loans, loan guarantees, interest subsidies, or insurance; ~~[or]~~

15 (D) assistance for which no accounting by the
16 grantee ~~[subgrantee]~~ is required; or

17 (E) payments that are made to a contractor for
18 the purpose of obtaining goods and services and that create a
19 procurement relationship between the department and the
20 contractor.

21 (3) Grantee ~~[(5) Subgrantee]~~--An individual or entity
22 to which a grant ~~[subgrant]~~ is awarded. The term includes~~[r~~
23 ~~including]~~ an individual or entity that receives an award that
24 is for the purpose of carrying out a part of a federal or state
25 award and that creates a federal or state assistance
26 relationship between the department and that individual or

1 entity [~~a subgrant from a subgrantee . Subgrantee is synonymous~~
2 ~~with subrecipient~~].

3
4 §9.132. Additional Award Conditions.

5 (a) In addition to the standard conditions for a grant, the
6 department may require one or more additional conditions under
7 this section if the department determines that additional
8 conditions are needed to ensure compliance with applicable laws
9 and standard grant conditions and requirements.

10 (b) The department may:

11 (1) provide that grant payments will be made as
12 reimbursements rather than advance payments;

13 (2) withhold authority for the grantee to proceed to
14 the next phase until the department receives evidence of
15 acceptable performance within a given period of performance;

16 (3) require additional or more detailed financial or
17 performance reports;

18 (4) require additional project monitoring;

19 (5) require the grantee to obtain technical or
20 management assistance;

21 (6) establish additional prior approvals; or

22 (7) require the grantee to comply with an improvement
23 action plan that identifies specific strategies and actions to
24 ensure the grantee's compliance with applicable laws and
25 standard grant conditions and requirements.

1 (c) The department will provide to the grantee a notice of
2 each additional condition required under this section. The
3 notice must:

- 4 (1) describe the additional condition;
5 (2) state the reason for the additional condition;
6 (3) state the time allowed for completing the
7 additional condition, if applicable;
8 (4) state the action, if any, that the grantee may
9 take to end the application of the additional condition; and
10 (5) set out the procedure for the grantee to request
11 reconsideration of the determination under subsection (a) of
12 this section to require the additional condition.

13
14 §9.133. Remedies for Noncompliance.

15 (a) If after the award of a grant the department determines
16 that the grantee has failed to comply with federal or state law,
17 a grant condition, or the grant agreement, the department may:

- 18 (1) temporarily withhold cash payments pending
19 correction of the deficiency by the grantee;
20 (2) disallow the cost of the activity or action that
21 is not in compliance and take action for the repayment of those
22 disallowed costs;
23 (3) require one or more of the additional conditions
24 described in §9.132 of this subchapter (relating to Additional
25 Award Conditions).

1 (b) If the department determines that the grantee's
2 noncompliance cannot be remedied by actions under subsection (a)
3 of this section, the department may take one or more actions
4 under this subsection. The department may:

5 (1) wholly or partly suspend or terminate the award;

6 (2) initiate proceedings under Chapter 10, Subchapter
7 F of this title (relating to Sanctions and Suspension for
8 Ethical Violations by Entities Doing Business with the
9 Department), for the suspension or debarment of the grantee;

10 (3) withhold other federal awards for the project or
11 program; or

12 (4) take any other remedy that is legally available to
13 the department.

14
15 §9.134. Notice of Remedies. If the department decides to take
16 an action under §9.133 of this subchapter (relating to Remedies
17 for Noncompliance), the department will notify the grantee in
18 writing within five working days after the date of the decision.
19 The notice must:

20 (1) state the action being taken and if applicable,
21 the period for which the action will be taken;

22 (2) summarize the facts and circumstances underlying
23 the action being taken; and

24 (3) explain how the action was selected.

25
26 §9.135. Appeal of Decision on Remedies.

1 (a) A grantee may appeal a determination under §9.133 of
2 this subchapter (relating to Remedies for Noncompliance), by
3 delivering to the executive director a written notice of appeal
4 and accompanying written documentation supporting the appeal
5 within 10 working days after the date of receipt of the notice
6 under §9.134 of this subchapter (relating to Notice of
7 Remedies).

8 (b) The executive director will make a decision on the
9 department's determination and may impose a lesser remedy for
10 noncompliance. The executive director will notify the grantee
11 in writing of the executive director's decision on the appeal
12 within 5 working days after the date of that decision.

13 (c) The executive director may delegate to a department
14 employee who holds a position that is not below the level of
15 division director any power or duty assigned to the executive
16 director by this section.

17 (d) A decision under subsection (b) of this section is
18 final and not subject to judicial review.

SUBCHAPTER H. GRANT SANCTIONS

§9.132. Applicability. This subchapter applies only to a subgrant awarded under:

- (1) 43 TAC Chapter 11, Subchapter E, Statewide Transportation Enhancement Program;
 - (2) 43 TAC Chapter 25, Subchapter I, Safe Routes to School Program;
 - (3) 43 TAC Chapter 25, Subchapter M, Traffic Safety Program;
 - (4) 43 TAC Chapter 30, Subchapter C, Aviation Facilities Development and Financial Assistance Rules;
 - (5) 43 TAC Chapter 31, Subchapter B, State Programs;
- or
- (6) 43 TAC Chapter 31, Subchapter C, Federal Programs.

§9.133. Procedure for Imposing Sanctions.

(a) The assistant executive director may impose sanctions on a subgrantee under §9.135 of this subchapter (relating to Withholding Funds or Disallowing Costs), §9.136 of this subchapter (relating to Suspension or Termination for Cause), or §9.137 of this subchapter (relating to Determination of Ineligibility).

(b) In making the decision whether to impose a sanction, the assistant executive director may consider, as a mitigating factor, whether the subgrantee has adopted and enforces an internal ethics and compliance program that satisfies the

1 requirements of §10.51 of this title (relating to Internal
2 Ethics and Compliance Program).

3 (c) If the assistant executive director decides to impose a
4 sanction on a subgrantee, the department will notify the
5 subgrantee of the sanction by certified mail within five working
6 days after the date of the assistant executive director's
7 decision. The notice will summarize the facts and circumstances
8 underlying the sanction, identify the period of the sanction and
9 the deadline for correction of deficient conditions, if
10 applicable, and state that the subgrantee may appeal the
11 sanction in accordance with §9.138 of this subchapter (relating
12 to Appeal of Sanction).

13 (d) Except as provided by §9.138(d) of this subchapter, a
14 sanction is effective on the date specified in the notice given
15 under subsection (c) of this section.

16 (e) The imposition of a sanction does not affect a
17 subgrantee's obligations under a grant or subgrant agreement
18 with the department or limit the department's remedies under
19 such an agreement. The department may take any remedy that is
20 legally available.

21 (f) For purposes of this subchapter, an act or omission by
22 an individual or other person on behalf of a subgrantee is
23 considered to be an act or omission of the subgrantee.

24
25 §9.134. Improvement Action Plan. The department may require a
26 subgrantee to comply with an improvement action plan that
27 identifies specific strategies and actions to resolve a

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1 subgrantee's non-compliance with law or with grant or subgrant
2 conditions. The plan will indicate the actions to be taken by
3 the subgrantee within a specified period. Failure to comply
4 with the plan may lead to the imposition of sanctions, but the
5 implementation of an improvement action plan is not a
6 prerequisite for the imposition of sanctions.

7
8 §9.135. Withholding Funds or Disallowing Costs.

9 (a) The assistant executive director may decide to
10 temporarily withhold funds from a specific project, part of a
11 project, or subsequent awards to a project or temporarily
12 disallow all or part of the cost of a noncomplying activity or
13 action for:

14 (1) failure to comply with any applicable federal or
15 state law or the grant or subgrant agreement;

16 (2) failure to submit required reports, including
17 expenditure, status, or progress reports, at the times and in
18 the manner established for the reports;

19 (3) significant deficiencies or irregularities in
20 records maintained by the subgrantee for operation or
21 administration of the grant or subgrant project;

22 (4) failure to conduct the grant or subgrant project
23 according to the terms of the application for grant or subgrant,
24 the grant or subgrant award document, the subgrantee acceptance
25 notice, or a grant or subgrant adjustment notice;

26 (5) failure to comply with a standard or special
27 condition of the grant or subgrant award document;

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1 (6) failure to comply with an improvement action plan;
2 or

3 (7) failure to begin project operations within the
4 period specified in the grant or subgrant award document or if
5 no period is specified in that document, within 45 days after
6 the project start date.

7 (b) The assistant executive director may decide to
8 temporarily withhold funds or disallow costs from all projects
9 operated by a subgrantee for:

10 (1) failure to respond to a deficiency listed in
11 subsection (a) of this section;

12 (2) failure to return to the department within the
13 required time any unused grant or subgrant funds remaining on an
14 expired grant or subgrant; or

15 (3) failure to return to the department any grant or
16 subgrant funds that have been improperly accounted for or
17 expended for ineligible purposes under a grant or subgrant.

18 (c) Funds withheld under this section may be released or
19 costs disallowed under this section may be allowed if the
20 assistant executive director receives satisfactory evidence that
21 the deficient conditions have been corrected. If the deficient
22 conditions are not corrected within the period set by the
23 department, the assistant executive director may decide to
24 permanently disallow all or part of the cost of a noncomplying
25 activity or action or may suspend or terminate the grant or
26 subgrant under §9.136 of this subchapter (relating to Suspension
27 or Termination for Cause).

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(d) At the assistant executive director's discretion, the withholding of funds or disallowance of costs under this section may be imposed immediately and will not be stayed during the pendency of an appeal. Funds may be withheld or costs disallowed under this subsection while more severe enforcement action is pending.

§9.136. Suspension or Termination for Cause.

(a) The assistant executive director may suspend or terminate all or part of a subgrant or all projects operated by a subgrantee for failure to comply with:

- (1) applicable federal or state law;
- (2) terms of the application for a grant or subgrant, the grant or subgrant award document, the grantee or subgrantee acceptance notice, or a grant or subgrant adjustment notice; or
- (3) standard or special grant or subgrant conditions or contractual agreements on which the subgrant awarded to the subgrantee is predicated.

(b) A suspension under this section must be based on a finding that:

- (1) deficient conditions make it unlikely that the objectives of the grant or subgrant will be accomplished;
- (2) the subgrantee has repeatedly failed to correct deficient conditions;
- (3) deficient conditions cannot be corrected within a period determined to be acceptable by the department; or

1 (4) the subgrantee has failed to correct a deficiency
2 listed in §9.135(a) or (b) of this subchapter (relating to
3 Withholding Funds or Disallowing Costs) in the period indicated
4 in the initial sanction notice sent under §9.133(c) of this
5 subchapter (relating to Procedure for Imposing Sanctions).

6 (c) A suspension imposed under this section may be
7 withdrawn if the assistant executive director receives
8 satisfactory evidence that all deficient conditions have been
9 corrected.

10 (d) A termination under this section must be based on a
11 finding described by subsection (b)(1), (2), or (3) of this
12 section or, if all or part of the subgrant or projects under the
13 subgrant have been suspended, a finding that the subgrantee has
14 failed to correct a deficiency in the period indicated in the
15 notice of suspension sent under §9.133(c) of this subchapter.

16 (e) On termination of a subgrant, the unexpended and
17 unobligated funds awarded to the subgrantee immediately revert
18 to the department.

19 (f) The costs of a subgrantee resulting from obligations
20 incurred by the subgrantee during a suspension or after
21 termination of an award are not allowable unless the department
22 expressly authorizes those costs in the notice of suspension or
23 termination given under §9.133(c) of this subchapter or in
24 writing after the date of that notice. Other subgrantee costs
25 incurred during suspension or after termination that are
26 necessary and not reasonably avoidable are allowable if:

1 (1) the costs result from obligations that were
2 properly incurred by the subgrantee before the effective date of
3 the suspension or termination, are not in anticipation of the
4 suspension or termination, and, in the case of a termination,
5 are noncancelable; and

6 (2) the costs normally would be allowable if the
7 subgrant award were not suspended or were to have expired at the
8 end of the funding period in which the termination takes effect.

9
10 §9.137. Determination of Ineligibility.

11 (a) The assistant executive director may determine that a
12 subgrantee is temporarily ineligible for future subgrant awards
13 if a subgrant awarded to the subgrantee is suspended or
14 terminated or could be suspended or terminated under §9.136 of
15 this subchapter (relating to Suspension or Termination for
16 Cause). At the assistant executive director's discretion, a
17 determination of temporary ineligibility under this subsection
18 may be imposed immediately and will not be stayed during the
19 pendency of an appeal.

20 (b) The assistant executive director may determine that a
21 subgrantee is permanently ineligible for future subgrant awards
22 if a subgrant awarded to the subgrantee is terminated or could
23 be terminated under §9.136 of this subchapter.

24
25 §9.138. Appeal of Sanction.

26 (a) A subgrantee may appeal a sanction by delivering to the
27 executive director a written notice within 10 working days after

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1 the date that the department mailed the notice of the sanction
2 under §9.133 of this subchapter (relating to Procedure for
3 Imposing Sanctions). For the purposes of this section, written
4 notice may be filed with the department by:

5 (1) sending the document by United States mail or by
6 overnight delivery service to: Executive Director, Texas
7 Department of Transportation, 125 East 11th Street, Austin,
8 Texas 78701; or

9 (2) hand delivering the document to: Executive
10 Director, Texas Department of Transportation, 125 East 11th
11 Street, Austin, Texas.

12 (b) The subgrantee may submit with the notice of appeal
13 written documentation in support of the appeal. The subgrantee
14 may alternatively request an in person meeting with the
15 executive director for the purpose of presenting written
16 documentation and oral presentation in support of the appeal and
17 answering questions posed by the executive director. The
18 meeting will be scheduled at the executive director's earliest
19 convenience.

20 (c) The executive director will consider any written
21 documentation submitted by a subgrantee and any oral
22 presentation given by a subgrantee in support of an appeal and
23 will make a decision on the subgrantee's appeal and issue a
24 final order.

25 (d) A sanction, other than a withholding of funds or
26 disallowance of costs under §9.135(d) of this subchapter
27 (relating to Withholding Funds or Disallowing Costs) or a

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1 temporary determination of ineligibility for future subgrant
2 awards under §9.137(a) of this subchapter (relating to
3 Determination of Ineligibility), is automatically stayed from
4 the date that the department receives the subgrantee's notice of
5 appeal until the executive director's decision under subsection
6 (c) of this section. On entry of a final order by the executive
7 director imposing the sanction, the full term of the sanction
8 will be imposed on the date of the final order unless the
9 executive director expressly orders that a lesser sanction be
10 imposed.

11 (e) If the subgrantee is unsatisfied with the executive
12 director's final order imposing a temporary or permanent
13 determination of ineligibility, the subgrantee may file a
14 petition with the executive director requesting an
15 administrative hearing under the provisions of §§1.21 et seq. of
16 this title (relating to Procedures in Contested Cases). To be
17 effective, the petition must be received by the executive
18 director within 10 working days after the date that the
19 executive director issues a final order.

20 (f) The decision of the executive director under subsection
21 (c) of this section is final and not subject to judicial review,
22 except as provided under subsection (e) of this section.

23
24 §9.139. Lessening Terms or Removal of Sanction. The executive
25 director at any time may lessen the terms of or remove a
26 sanction imposed under this subchapter.